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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 578

HENRIK MANNERFRID, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 42-46) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 1952 (R. 46-47). The petition for a writ of certiorari was filed on January

30, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the selective service authorities could validly treat as a resident alien subject to military service an alien who failed to apply for a determination of his residence within three months after entry into the United States.

2. Whether the fact that petitioner claimed exemption from American military service because he thought that it would make him an American citizen and thereby deprive him of certain Swedish property rights, prevents his claim of such exemption from operating to debar him from obtaining United States citizenship.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 12-18.

STATEMENT

On April 17, 1951, petitioner filed his petition for naturalization in the United States District Court for the Southern District of New York (R. 2-6). The petition was denied on the ground that petitioner, having claimed relief from American military service as a neutral alien, was barred from citizenship under Section 3(a) the Selective Training and Service Act of 1940 (Appendix, *infra*, p. 12) (see R. 31-35). The decision of the

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district court was unanimously affirmed by the Court of Appeals for the Second Circuit (R. 42-46).

At the final hearing on the petition before the district court, it was shown that petitioner had been admitted to the United States as a temporary visitor for business purposes on June 4, 1941, and that he had been in this country ever since that time. In April 1949, slightly over two years prior to the filing of his petition for naturalization, he had been admitted to the United States for permanent residence and married an American citizen (R. 2-3).[1]

On March 15, 1943, petitioner had filed an "Application by Alien for Relief from Military Service" which contained, *inter alia,* the following provision (see Government's Ex. 3, R. 26-28):

> I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States under the Selective Training and Service Act of 1940, as amended, in accordance with the act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States. * * *

---

[1] See 8 U.S.C. 711, which provided for the naturalization of aliens married to United States citizens for at least a year prior to filing naturalization petitions if the aliens resided here for at least two years prior to such filing.

Simultaneously with the filing of this application, petitioner had sent to his local draft board a letter which included the following passage (Government's Ex. 4, R. 29-30):

> * * * As I am only here in the United States for the duration and will go back to Sweden to my main office Henrik Mannerfrid Aktiebolag as soon as the war is over, and as I do not intend to become an American citizen, my friend, Consul Hugo de Thamm, advised me to file above application. I also want to state that if I would not have filed this application and joined the American forces, I would automatically have become an United States citizen and as a United States citizen I would be a foreigner in my own country, and as a foreigner I am not allowed to control any Swedish company or own real estate without certain permissions. * * *

Petitioner testified that it was because of his incorrect view of the consequences of American military service that he had executed the application for relief from service (R. 15). He contended that because of his mistake the debarment from citizenship of Section 3(a) should not be applicable against him.

The Commissioner of Immigration and Naturalization, finding that a mistake had been made, recommended naturalization (see Govern-

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ment's Ex. 2, R. 20-26), although previously the Hearing Examiner had concluded that petitioner was not eligible for naturalization (see Government's Ex. 1, R. 16-19). The District Court and Court of Appeals decided against petitioner's contention in this respect.

Petitioner made the additional contention that since he was not a "resident" of the United States at the time he executed the application, he was under no duty to file the application, with the consequence that it was a nullity. However, both the Hearing Examiner and the Commissioner ruled that under the applicable regulations, petitioner was a resident. The District Court and the Court of Appeals agreed.

ARGUMENT

1. Petitioner first contends that the waiver of right to citizenship which he signed is not binding against him because he was not a "resident" of the United States at the time that he signed it. He does not dispute that the Selective Service regulations require a contrary result, because they clearly provide that an alien who fails for more than three months after entry to file an Alien's Application for Determination of Residence is, for Selective Service purposes, a "male person residing in the United States." See 32 C.F.R. (1943 Supp.) 611.12, 611.13, *infra*, pp. 14-17. Rather, petitioner urges that the regulations are invalid in that they treat as a resident one who clearly

may not be such under the Selective Training and Service Act. In this respect petitioner asserts that a conflict exists between the decision in this case and *McGrath* v. *Kristensen,* 340 U.S. 162 (Pet. 5). But, as the court below made clear (R. 43), *Kristensen* is not controlling here since the Selective Service regulations at issue were not operative as to that alien at the time he applied for exemption from service.

The answer to petitioner's argument is that as an alien sojourning here, he could be held to the burden of promptly initiating a determination of his residence by his local draft board, as the alternative to being treated automatically as a resident. Section 3(a) of the Selective Training and Service Act made eligible for military service every "male person residing in the United States." The words "residing in" are obviously not capable of mechanical definition. Precise definition was left for administrative determination. *McGrath* v. *Kristensen,* 340 U.S. 162, 173, 175; see *United States* v. *Rubinstein,* 166 F. 2d 249, 254 (C.A. 2), certiorari denied, 333 U.S. 868. Even the regulations (*infra,* pp. 14-17) did not undertake to define in detail all possible factors to be considered in determining residence for the purposes of military service. As to persons not clearly in an immune status, such as diplomatic officials, the regulations made a preliminary separation, treating those in the country less than

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three months as nonresidents, and leaving the classification of those here for more than three months for determination on a case to case basis. (See Section 611.13(6), *infra*, p. 16.) All that the attacked regulations required was that an alien, within three months after entry, indicate to the Selective Service officials that he claimed the status of a nonresident. If he did not do so, he was to be deemed to have acquiesced in being treated as a resident alien; if he did make such a claim, his case would be determined on its individual facts.

There is nothing unreasonable about such regulations, on their face or as applied to petitioner. The wide divergence in the status of aliens in this country and the need for rapid Selective Service classification of men made it reasonable to cast upon an alien, in this country for some period of time, the duty of taking some affirmative step to assert his claim of nonresidence.[2] Cf. *Machado*

[2] It should be noted that Section 2 of the Selective Training and Service Act as it was passed in 1940 provided that "every male citizen of the United States and * * * every male alien residing in the United States" was subject to registration; and Section 3(a)at that time provided that "every male citizen * * * and every male alien residing in the United States who has declared his intention to become such a citizen" should be liable to service. 54 Stat. 885. During 1940, the Attorney General rendered an opinion to the effect that the words of Section 2 defining those subject to registration included "every alien * * * who lives or has a place of residence or abode in the United States, temporary or otherwise, or for whatever purpose taken or established * * *." 39 Opp. Atty.

v. *McGrath,* 193 F. 2d 706 (C.A. D.C.), certiorari denied, 342 U.S. 948. Having acquiesced in his treatment as a resident, and having sought exemption as a resident neutral alien, petitioner should not be allowed, years later, to disclaim such status.

The pattern of requiring affirmative action to claim a particular status is not an unusual one. Thus, citizens claiming to be exempt from military service as conscientious objectors must make timely assertion of their claim (cf. 32 C.F.R. (1941 Supp.) 623.2, 32 C.F.R. (1940 Supp.) 603.371); and important constitutional rights, such as the privilege against self-incrimination, are waived if not promptly asserted. *Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103, 113.

2. Petitioner also contends that he should not be debarred from United States citizenship by virtue of his signing an application for exemption from military service, because he was mistaken in his assumption, at the time he signed it, that it was necessary to do so in order to protect his Swedish property interests. However, the very

---

Gen. 504, 505. In 1941, the Act was amended to impose liability for registration and service on "every male citizen * * * and every other male person residing in the United States." 55 Stat. 844, 845. Although the then Attorney General has subsequently concluded that his 1940 opinion was erroneous, *McGrath* v. *Kristensen,* 340 U.S. 162, 176, the fact remains that this view was outstanding at the time of the passage of the 1941 legislation.

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letter embodying the aileged mistake clearly shows that petitioner knew that he was renouncing an opportunity to become an American citizen (see p. 4, *supra*). His mistake was not as to the effect of the claim of exemption on his right to citizenship here, but as to the need to claim exemption to protect his interests abroad. For this reason, the decisions of this Court in *Moser* v. *United States,* 341 U.S. 41, and of the Court of Appeals for the District of Columbia Circuit in *Machado* v. *McGrath,* 193 F. 2d 706, certiorari denied, 342 U.S. 948, on the basis of which petitioner asserts that a conflict exists, are inapplicable.

The *Moser* case held that a citizen of Switzerland who filed a claim for exemption from American military service on the ground that he was a neutral alien was not debarred from later United States citizenship, because, in "all the circumstances of the case * * * nothing less than an intelligent waiver is required * * *." But there "all the circumstances of the case" were very different from the present case. Because of the contention by the Swiss government that Section 3(a) of the Selective Training and Service Act violated an earlier Swiss-American treaty, the American Department of State had prepared a revised form of claim of exemption which deleted the language, found in the form signed by the present petitioner (see Govt. Ex. No. 3, R. 26-28), that "I understand that the making of

this application to be relieved from such liability will debar me from becoming a citizen of the United States" (*supra,* p. 3). In short, Moser was led to believe by the Swiss Legation, and indirectly, by the American Department of State, that what might have appeared to be a waiver was not in fact so because of special understanding between the two governments involved. That being so, Moser could not fairly be said to have knowingly intended to waive his future right to American citizenship.

The *Machado* case holds that a neutral alien may not be bound to a waiver of the right to United States citizenship when he alleges that at the time he signed an application for exemption from military service " 'he was not able to fully understand' its nature; that he was not able to read or write the English language 'with full comprehension'; that he signed the form upon the advice of a clerk of his local draft board; that the form was not explained to him; and that in signing it, he thought he was claiming exemption on the ground of non-residence, not on the ground of neutral alienage." 193 F. 2d at 708.

Neither of these cases supports the contention made here. In both cases, it can be reasonably said that the alien did not make an advertent waiver of the right to seek United States citizenship. In the *Machado* case, the alien did not know what he was signing. In the *Moser* case, although the alien knew what he was signing, the statement

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itself was fairly equivocal, and, in any event, it was signed because of assurances from the Swiss and American governments that it did not mean what it might be construed to have said.[3] Neither Moser nor Machado ever intended to waive their rights to American citizenship. Not so in the present case. Petitioner understood that he was waiving the right to United States citizenship. He adverted to it explicitly (supra, p. 4). Although he now asserts he was mistaken in his understanding of the consequences of serving in our armed services, his letter to the local draft board (*idem*) shows that he intended by claiming exemption to waive the right which he now claims.[4]

---

[3] The suggestion in the petition for certiorari (pp. 18-19) that "Petitioner mistakenly believed that he was subject to the Selective Service Act because of the erroneous opinion of Attorney General Jackson that all persons physically present in the United States were subject to service" finds no support in the record.

[4] We submit there is no basis for the argument that the draft board had the responsibility to set aright petitioner's misconceptions. Indeed, the misconception is based in part on a view of the Swedish law as to which the draft board was presumably not informed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Robert L. Stern
~~WALTER J. CUMMINGS, JR.,~~
Acting Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
JOHN R. WILKINS,
Attorneys.

MARCH 1953.

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APPENDIX

Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 55 Stat. 844:

SEC. 3 (a) [50 U. S. C. App. 303 (a)]. Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction * * * he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *.

SEC. 5 (a) [50 U. S. C. App. 305 (a)]. Commissioned officers, warrant officers, pay clerks, and enlisted men of the Regular Army * * * and diplomatic representatives, technical attachés of foreign embassies and legations, consuls general, consuls, vice consuls, and consular agents of foreign countries, and persons in other categories to be specified by the President, residing in the United States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States, shall not be required to be registered

under section 2 and shall be relieved from liability for training and service under section 3 (b).

SEC. 10 [50 U. S. C. App. 310].

(a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. * * *

Immigration Act of 1924, as amended (43 Stat. 153, 54 Stat. 711):

SEC. 3 [8 U. S. C. 203]. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) an accredited official of a foreign government recognized by the Government of the United States, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an

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alien in continuous transit through the United States * * *.

* * * * *

SEC. 15 [8 U. S. C. 215]. The admission to the United States of an alien excepted from the class of immigrants by clauses (1), (2), (3), (4), (5), or (6) of section 3 * * * shall be for such time and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clause (2), (3), (4), or (6) of section 3 * * * the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States * * *.

* * * * *

SEC. 28 (c) [8 U. S. C. 224 (c)]. The term "ineligible to citizenship," when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under * * * section 2 of the Act * * * approved May 18, 1917, as amended, or under law amendatory of, supplementary to, or in substitution for, any of such sections; * * *.

32 Code of Federal Regulations (effective February 7, 1942, 7 Fed. Reg. 855, and September 14, 1942, 7 Fed. Reg. 7222):

SEC. 611.12. *When a nondeclarant alien is residing in the United States.* Every male

alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States, unless he is in one of the categories specifically excepted by the provisions of § 611.13, is "a male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended.

SEC. 611.13. *When a nondeclarant alien is not residing in the United States.* A male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended; provided he has in his personal possession an official document issued pursuant to authorization of or described by the Director of Selective Service which identifies him as a person not required to present himself for and submit to registration and provided:

(1) He is a diplomatic representative, a technical attaché of a foreign embassy or legation, a consul general, a consul, a vice consul, or a consular agent of a foreign country; or

(2) He is an employee of a foreign embassy, legation, or consulate and a national of the country employing him who has been notified to the Department of State; or

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(3) He is an official or an employee of a foreign government and a national of the country employing him, who has been notified to the Department of State: *Provided*, That at the time he is notified to the Department of State, a proper representative of his government advises and the Department of State and the Director of Selective Service agrees that he is in fact not residing in the United States; or

(4) He is a dependent male child of any person described in subparagraph (1), (2), or (3) of this paragraph; or

(5) He is a member and in the active service of the armed forces of a cobelligerent or a neutral country; or

(6) He has entered or hereafter enters the United States in a manner prescribed by its laws and does not remain in the United States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later; or

(7) He has, within the time prescribed and in the manner provided in § 611.21, filed with the local board with which he is registered, or if he is not registered, with the local board having jurisdiction over the area in which he is located, an Alien's Application for Determination of Residence (Form 302) together with an Alien's Personal History and Statement (Form 304) and such application is either pending or has resulted in the issuance

by the local board of an Alien's Certificate of Nonresidence (Form 303) which has not expired; or

(8) He is an individual designated by the Director of Selective Service as not required to present himself for and submit to registration; or

(9) He is within a group of individuals described by the Director of Selective Service as not required to present themselves for and submit to registration.

SEC. 611.21 [8 F. R. 1346]. *What aliens may apply for a determination.* Any nondeclarant alien who has entered or who hereafter enters the United States * * * may file with his local board * * * an Alien's Application for Determination of Residence (Form 302): *Provided,* That such application is filed within three months after the date of his entry into the United States or within three months after persons of his age become liable for training and service by law, whichever is the later: *And provided further,* That such application is filed prior to induction. * * *

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